

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DENA PIPKIN, personally and as Personal
Representative of the ESTATE OF JOSHUA
HIGHTOWER; RICHARD HIGHTOWER,

Plaintiffs,

v.

THE BURLINGTON NORTHERN AND
SANTA FE RAILROAD COMPANY, a
foreign corporation; CREW SHUTTLE
SERVICE, INC., a foreign corporation,
UNION PACIFIC RAILROAD COMPANY,

Defendants.

Case No. C04-5591RJB

ORDER GRANTING MOTION
FOR CONTINUANCE of TRIAL
DATE

This matter comes before the Court on Party Intervenor Union Pacific's Motion for Continuance of the Trial and Pretrial Dates. Dkt. 59. The Court has reviewed all documents filed in support of and in opposition to this motion, has reviewed the entire file, and is fully advised.

I. BASIC and PROCEDURAL FACTS

According to the First Amended Complaint ("Complaint"), on September 4, 2003, eight year old Joshua Hightower died while playing with a friend at the Rocky Point Rail Yard. Dkt. 27, at 2-3. Rocky Point is owned and maintained by Defendant Burlington Northern and Santa Fe Railroad Company ("Burlington"). *Id.* Joshua was found by his friend's mother, Angela Moore, after her son ran to her for help, telling her Joshua had been hit by a train. Dkt. 48-2, at

1 1. The Cowlitz County Sheriff's Office Report indicates that a shuttle driver for Crew Shuttle
2 Service, Inc. ("Crew") saw the children playing around a work train and then saw a Union
3 Pacific Railroad Company ("Union Pacific") train pass going southbound. Dkt. 48-2, at 2. The
4 police report indicated a that upon examination of the Union Pacific train, the officer saw a
5 "very small dot on the left side of the hand rail, most forward on the lead train that appeared to
6 possibly have a very small blood mark on it." Dkt. 48-2, at 2. According to Plaintiffs, Plaintiffs
7 and Defendants do not dispute that Joshua's death was caused by being hit by a Union Pacific
8 train. Dkt. 53. Union Pacific offers another explanation as to the cause of Joshua's death,
9 noting tests results dated May 24, 2005, indicate the spot found on its' train to be negative for
10 blood. *Id.* at 6.

11 Plaintiffs sued Burlington under an attractive nuisance theory, later adding Crew for
12 failure to warn Joshua of the danger. Dkt. 27. Burlington removed this case to this Court based
13 on diversity jurisdiction. Dkt. 1. Union Pacific's motion to intervene as a defendant was
14 granted on July 25, 2005. Dkt. 56. Trial in this matter is set for November 28, 2005. Dkt. 14.
15 Union Pacific now moves to continue the trial date. Dkt. 59.

16 **II. DISCUSSION**

17 In determining whether a trial court has abused it's discretion in denying or granting a
18 motion to continue a trial, the Ninth Circuit has set forth four factors: 1) the moving party's
19 diligence prior to the date from which a continuance is sought; 2) whether the continuance
20 would serve a useful purpose, 3) inconvenience to the court, opposing parties, and witnesses,
21 and 4) amount of prejudice suffered by the moving party due to denial of the continuance.
22 *Armant v. Marquez*, 772 F.2d 552, 556 (9th Cir. 1985), cert. denied, 475 U.S. 1099 (1986).

23 Union Pacific's motion to continue the trial date should be granted. Trial should be reset
24 to January 30, 2006 at 9:30 a.m. Union Pacific has been diligent in it's participation in this case.
25 Although not an original defendant, when Union Pacific determined that there was evidence it's
26 train may not have caused Joshua's death, it timely moved to intervene as a defendant. A
continuation until January would serve a useful purpose. It would allow Union Pacific, a party

that intervened on July 25, 2005, time to prepare it's defense, while not overly prejudicing Plaintiffs. The two month delay would not unduly inconvenience the court, opposing parties or witnesses. If the continuance is not granted, Union Pacific would be prejudiced. The January 30, 2006 date is appropriate in an effort to strike a balance between Plaintiffs' interest in achieving a timely end to this matter and allowing Union Pacific to adequately defend itself.

In light of the new trial date, certain other pretrial dates should also be reset:

Discovery COMPLETED by	November 30, 2005
All dispositive motions must be FILED by	December 8, 2005
Settlement conference per CR 39.1(c)(2) Held no later than	December 12, 2005
Mediation per CR 39.1(c)(3) HELD no later than	December 31, 2005
Letter of compliance as to CR 39.1 FILED by	January 7, 2006
Motions in limine should be FILED by and NOTED on the motion calendar no later than the second Friday thereafter.	January 2, 2006
Agreed pretrial order LODGED with the court by	January 13, 2006
Pretrial conference will be HELD at 8:30 on (COUNSEL SHALL REPORT TO COURTROOM A)	January 20, 2006
Trial briefs, proposed voir dire & jury instructions due	January 20, 2006.

III. ORDER

Therefore, it is now

ORDERED that Party Intervenor Union Pacific's Motion for Continuance of the Trial and Pretrial Dates (Dkt. 59) is **GRANTED as follows:**

TEN DAY JURY TRIAL set for 9:30 a.m. on	January 30, 2006
Discovery COMPLETED by	November 30, 2005
All dispositive motions must be FILED by	December 8, 2005
Settlement conference per CR 39.1(c)(2) Held no later than	December 12, 2005
Mediation per CR 39.1(c)(3) HELD no later than	December 31, 2005
Letter of compliance as to CR 39.1 FILED by	January 7, 2006

1 Motions in limine should be FILED by January 2, 2006
2 and NOTED on the motion calendar no later than
the second Friday thereafter.

3 Agreed pretrial order LODGED with the court by January 13, 2006

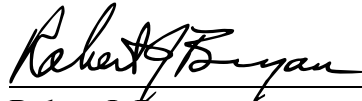
4 Pretrial conference will be HELD at 8:30 on January 20, 2006
(COUNSEL SHALL REPORT TO COURTROOM A)

5 Trial briefs, proposed voir dire & jury instructions due January 20, 2006.

6 Further, parties are **ORDERED** to forthwith meet and confer in order to create a final discovery
7 plan for remaining discovery.

8 The Clerk of the Court is instructed to send uncertified copies of this Order to all
9 counsel of record and to any party appearing *pro se* at said party's last known address.

10 DATED this 8th day of September, 2005.

11 
12 Robert J. Bryan
13 United States District Judge
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